

Dodsal Private Ltd

Vs

Delhi Electric Supply Undertaking of the Municipal Corporation of Delhi

Civil Appeals Nos. 2372-2374 of 1987

(B. L. Hansaria, K. Venkataswami JJ)

14.02.1996

JUDGMENT

1. An absolutely inequitable stand taken by the respondent (Delhi Electric Supply Undertaking) has led us to examine some fundamental questions of law. We have opened with this observation inasmuch as the respondent has challenged the award of the arbitrators made in favour of the appellant on the ground that the contract, which contained arbitration agreement, is void, because of which there is no agreement to refer the dispute to arbitration; and so, the arbitrators had no jurisdiction to pass impugned award. Such a stand flies on the face of the respondent inasmuch as of the two arbitrators, one, namely Shri K.L. Vijn, had been appointed by the respondent itself. But as the award ultimately went in favour of the appellant, it raised the question of jurisdiction. We have no doubt in our mind that such a stand is inequitable, indeed highly inequitable. Question, however, is whether the law permits such a question to be raised.

2. The High Court accepted the contention that the contract was void inasmuch as Sections 201 and 203 of the Delhi Municipal Corporation Act read with bye-law 3(1) (a) were violated. Dr. Singhvi, appearing for the respondent has urged that the contract being void, along with it fell the arbitration agreement contained in the contract, because of which the arbitrators had no jurisdiction to pass the award in question.

3. It is further submitted that in such a case appearance of the respondents in the proceeding, i.e. its acquiescence, would not alter the situation in view of what has been held by a Constitution Bench of this Court in *Waverley Jute Mills Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd.*, AIR 1963 SC 90, in paragraph 21 of which it was stated that "an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings even if that is without protest, because it is well settled that consent cannot confer jurisdiction."

4. The aforesaid stand brings to the fore the following fundamental questions of law:-

(1) Whether the present was a case of contract being void or voidable ?

(2) Whether a mandatory provision cannot at all be waived?

5. As we are proposing to refer the matter to a Constitution Bench, we may not dilate the questions, except stating that a perusal of 'Administrative Law' by Wade and Forsyth (7th Edn. Pages 339 to 344) would show that in *Ridge v. Baldwin*, 1964 AC 40, some of the dissenting judges of the House

of Lords suggested that even ultra vires action might be merely voidable. Reference has also been made to what was held in *Anisminic Ltd. v. Foreign Compensation Commission*, (1969) 2 AC 147, which has dealt with the question whether there are degrees of nullity. As to waiver of a mandatory provision, we may refer to a recent decision of this Court in *Krishan Lal v. State of J and K*. (1994) 4 SCC 422, in which this aspect has been dealt in paras 16 to 25. It has been pointed out that even a mandatory provision can be waived, if the provision be intended for the benefit of the concerned person, as distinguished from one which serves "an important purpose" in which case there would be no waiver.

6. In this connection we may also refer to the provision contained in Section 4 of the Arbitration and Conciliation Ordinance, 1996, which is on the subject of "Waiver of right to object". It has laid down that a party who knows (a) any provision of this part from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

7. Another legal aspect is also involved in the present case. The same is whether an arbitration agreement can be read de hors what was contained in the contract. The respondent having itself appointed one of the arbitrators in writing, an examinable question arises whether this act cannot be said to constitute an implied agreement to refer the matter to arbitration. It may be pointed out that Section 7 (2) of the aforesaid Ordinance recognises a separate agreement also.

8. Though the aforesaid questions were not examined in *Waverley Jute Mills'* case (AIR 1963 SC 90) and it would have been open to us to decide the same ourselves, we do not propose to do so, lest it be thought that we are over-reaching the decision by a larger bench. Instead, we desire that a 5-Judge Bench - *Waverley* being a rendering by such a Bench - should decide whether in the context of the legal aspects mentioned by us above, it is open to a person like the respondent to raise the question of lack of jurisdiction of the arbitrator(s) and thereby deny the fruits (to the other side) of a long fought and won battle, involving huge expenditure of time, money and energy, and thereby cause serious damage to equity also, which is an equally important facet to be borne in mind by the Courts when seized with deciding a lis between parties.

9. Let the Registry lay the papers before the Hon'ble Chief Justice of India for doing the needful. Order accordingly.